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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. OTIS JOHNSON III, Defendant and Appellant.	2d Crim. No. B208131 (Super. Ct. No. MA041029) (Los Angeles County)

Otis Johnson III appeals the judgment following his conviction for two counts of second degree commercial burglary. (Pen. Code, § 459.)[1] He contends the trial court improperly admitted evidence in violation of his constitutional rights to due process and to confront and cross-examine witnesses. He also claims prosecutorial misconduct and abuse of discretion in denying probation. We affirm.

FACTS AND PROCEDURAL HISTORY

Donyil Livingston was employed by Wal-Mart as a loss prevention officer. While patrolling the store on January 7, 2008, Livingston saw Joban Collier struggling with a bag of dog food due to a disability, and helped Collier put the dog food into a shopping cart. Johnson was standing nearby but did not help Collier himself. Livingston

[1] All statutory references are to the Penal Code unless otherwise stated.

recognized Collier from a previous occasion when he helped Collier unlock his car door after leaving his keys inside.

Collier seemed to know Johnson and they walked to the checkout area together. Johnson was wearing a large jacket and had his hands in his pockets. Collier bought a dog biscuit but not the dog food. Johnson bought nothing. Johnson's hands remained in his pockets as he left the store.

Approximately an hour later, a store manager called Livingston to the pet department to investigate three empty boxes for 19-inch flat screen televisions. The boxes had been placed side-by-side behind bags of dog food. Livingston viewed a security videotape taken a few minutes before he encountered Collier and Johnson. The videotape showed Johnson walk to the electronics department three times and carry a television box to the pet department each time. It also showed that Johnson's back was square and flat as he and Collier walked out of the store. At trial Livingston demonstrated to the jury how a person could carry a flat television set on his back under a jacket while keeping his hands in his pockets.

On January 14, 2008, a store greeter paged Livingston to the exit doors of the store's garden center. The greeter pointed to a customer who had refused to stop and left with something under his jacket. Livingston identified the customer as Johnson, and followed Johnson to the parking structure. Johnson repeatedly looked at Livingston and then crouched behind a black car that Livingston recognized as belonging to Collier. Livingston approached Johnson and saw a television set underneath the car. Johnson left the parking structure and Livingston called the police.

Collier walked up to his car. Collier had a two-way walkie-talkie and Livingston saw him talking to another person on the device. Collier returned to the store. Two empty television boxes were found in the pet department close to where the three boxes had been found a week earlier. The television under Collier's car was one of the missing televisions. The other missing television was found in the pet department.

On January 17, 2008, Johnson was seen entering the store by Wal-Mart loss prevention officer, Juben Hernandez. Hernandez called Livingston and both officers

followed Johnson inside the store. After evading the officers for a period of time, Johnson agreed to talk to them. Although Livingston did not even mention televisions, Johnson expressly denied any involvement in the theft of televisions. Livingston and Hernandez then detained Johnson after a brief struggle.

Johnson had pliers and two screwdrivers in his possession, as well as a walkie-talkie and a belt wrapped around his chest. Johnson also had a list of items he needed to obtain for purposes of sale to others. The list included 19-inch television sets and DVD players identified by brand name, a cordless headphone, several memory cards, wireless keyboards, and other electronic equipment. When the police arrived, Johnson told sheriff's deputy Micah Currado that he met Collier a week earlier. He also stated that a few days later he saw Collier at Wal-Mart and believed Collier was stealing a television.

Johnson was charged with four counts of commercial burglary, grand theft of personal property (§ 487, subd. (a)), and possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). Two of the burglary counts were dismissed before trial, and the grand theft count was dismissed after a jury deadlocked. Johnson was convicted on two burglary counts and acquitted of the drug charge. He was sentenced to the two-year midterm for one burglary and a concurrent two-year term for the other.

DISCUSSION

Secondary Evidence of Content of Videotape Properly Admitted

Due to a technical malfunction, the January 7, 2008, videotape could not be played for the jury, and the trial court admitted testimony from Livingston and Hernandez describing what they saw on the videotape. Johnson contends the trial court erred because the testimony did not satisfy the requirements of the secondary evidence rule, and admission violated his right to due process. (See Evid. Code, § 1523.) We disagree.

Under certain circumstances, the content of a writing may be proven by secondary evidence. (Evid. Code, § 1521, subd. (a).)[2] Oral testimony is admissible as

[2] A videotape is considered a writing. (*People v. Archer* (1989) 215 Cal.App.3d 197, 207.)

such proof only if "the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence." (Evid. Code, §§ 1523, subds. (a) & (b), 1521, subd. (b).) In addition, the trial court must exclude secondary evidence when the proponent "has not made the original reasonably available for inspection at or before trial," or where there is a "genuine dispute" concerning its material terms or admission would be unfair. (Evid. Code, §§ 1521, subd. (a)(1), (2), 1522, subd. (a).) We review a trial court's ruling on the admission of secondary evidence under the abuse of discretion standard. There was no abuse of discretion in this case. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1013; *People v. Memro* (1995) 11 Cal.4th 786, 830.)

Although Livingston, Hernandez and the prosecutor were able to view the January 7, 2008, videotape, a technical malfunction prevented the tape from being seen by the defense or the jury. In an Evidence Code section 402 hearing, Johnson argued that Livingston's testimony describing the videotape would be hearsay, a violation of discovery rules, and a violation of due process. The trial court overruled Johnson's objections, found the videotape did not exist due to a technical malfunction, and permitted Livingston and Hernandez to testify as to its contents.

As respondent argues, Johnson forfeited his "secondary evidence" argument by failing to make a specific objection on that ground in the trial court. (*People v. Armstrong* (1991) 232 Cal.App.3d 228, 242-243.) On appeal, Johnson argues that the testimony should have been excluded because the prosecution failed to make a reasonable effort to make the videotape available for inspection (Evid. Code, § 1522, subd. (a)), there was a genuine dispute concerning the content of the tape, and justice and fairness required exclusion (Evid. Code, § 1521, subd. (a)(1), (2)). At trial, however, defense counsel did not mention the secondary evidence rule or these statutory requirements.

Furthermore, Johnson's contentions are unpersuasive on the merits. The prosecutor made a reasonable effort to preserve or copy the original videotape. She testified that she attempted to retrieve the original recording "several times" but was unsuccessful. In addition, the record does not show a genuine dispute concerning the

content of the videotape or any other basis for excluding Livingston's testimony. Johnson asserts that Livingston had a proclivity to embellish the facts and that his credibility was impeached at trial as to various matters, but these assertions are speculative and exaggerated. Our review of the record shows certain minor inconsistencies but no material inconsistencies in Livingston's testimony, or that critical portions of his testimony were contradicted by other evidence. In addition, Livingston's testimony was limited to a description of the contents of the January 7, 2008, videotape, was corroborated by Hernandez's testimony, and was further corroborated by other evidence regarding the January 7, 2008, events.

No Prejudicial Misconduct by Prosecutor

Johnson contends that the prosecutor committed prejudicial misconduct during her rebuttal argument by referring to matters outside the record, namely the purported incriminating content of missing videotapes. We disagree.

A prosecutor's behavior violates the federal Constitution when it is so egregious that it renders the trial with such unfairness that it constitutes a denial of due process. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214-1215.) Under California law, conduct by a prosecutor that does not render a trial unfair is misconduct when it involves the use of deceptive or reprehensible methods to persuade the court or jury. (*People v. Tafoya* (2007) 42 Cal.4th 147, 176; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

A prosecutor is allowed "'. . . a wide range of descriptive comment . . .'" on the evidence, and may state his or her opinion based on reasonable inferences from the evidence, but it is misconduct for a prosecutor to refer to matters outside the record. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026; *People v. Farnam* (2002) 28 Cal.4th 107, 168.) Here, the evidence showed Johnson taking three boxed televisions out of the electronics department, one box at a time. The evidence also showed that three empty television boxes had been placed behind dog food in the pet department. There was only one tape of Johnson leaving the store, perhaps with a television under his coat. During argument, the prosecutor told the jury that if the prosecution had tapes of Johnson entering and exiting the store at two other times, two additional burglary counts could

have been charged. This comment by the prosecutor constituted misconduct because it referred to matters outside the record, namely the purported incriminating content of missing videotapes.

Johnson waived the claim, however, by failing to make a sufficiently specific objection in the trial court, or request an admonition. (*People v. Brown* (2004) 33 Cal.4th 382, 398-399.) To preserve a claim of prosecutorial misconduct, the defendant must request an admonition, unless an admonition would have been futile or would not have cured the harm caused by the misconduct. (*People v. Bennett* (2009) 45 Cal.4th 577, 595; *People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Here, the prosecutor argued that, if the videotapes showing Johnson entering and exiting the store were available, Johnson would have been charged with additional counts of burglary. Johnson objected on the ground that the prosecutor "was testifying," and the objection was sustained. Defense counsel did not request the trial court to admonish the jury, and a request for an admonition would not have been futile in light of the ruling sustaining Johnson's objection.

Moreover, the record establishes that the misconduct was not prejudicial. The jury was aware that Livingston and Hernandez were testifying as to what they saw on a video that was not played for the jury. And, defense counsel was first to raise the question of the missing tapes during argument. In this context, there is no reasonable likelihood that the jury construed or applied the prosecutor's comment as implying that the prosecutor had independent knowledge apart from the evidence. (*People v. Cole* (2004) 33 Cal.4th 1158, 1202-1203.)

No Error in Admission of Out-of-Court Statements

Johnson contends that the admission of out-of-court statements by Joban Collier and a Wal-Mart greeter violated his constitutional right to confrontation and cross-examination. We disagree.

Crawford v. Washington (2004) 541 U.S. 36, 50-54, held that the confrontation clause prohibits the admission of an out-of-court statement by a non-testifying declarant that is "testimonial" in nature unless the declarant is unavailable and

the defendant has had an opportunity for cross-examination. Although not defined by the court, testimonial statements include testimony at a preliminary hearing, statements during police interrogations, and other statements which a reasonable person would believe could be used to establish some past fact for possible use in a future criminal trial. (*Id*. at pp. 52, 68; *People v. Cage* (2007) 40 Cal.4th 965, 969, 984.) Statements made during a police interrogation are not testimonial if made under circumstances which objectively indicate that the primary purpose of the interrogation is to enable police to meet an ongoing emergency. (*Davis v. Washington* (2006) 547 U.S. 813, 822.)

Here, Johnson challenges the admission of statements by two non-testifying witnesses. First, Livingston testified that, on January 14, 2008, he was summoned to the exit doors of the store's garden center and told by a store greeter that a man, identified by Livingston as Johnson, had refused to stop at her request and was carrying something under his jacket.

The store greeter's statement was not testimonial because Livingston was a Wal-Mart employee, not a police officer, and the statement was not taken under circumstances with any degree of formality and solemnity characteristic of testimony. (*People v. Cage, supra,* 40 Cal.4th at p. 984.) Also, Livingston was involved in an ongoing emergency in the form of a contemporaneous criminal act, and the greeter's statement was made to assist Livingston in his pursuit of a suspected thief.

Second, sheriff's detective Jonathan Stambook testified regarding a statement made by Joban Collier during a police interview at the time of his January 20, 2008, arrest. Stambook testified that both Johnson and Collier told him they had met for the first time on or near January 14, 2008. Johnson said they met in Wal-Mart and Collier said they met somewhere else in the same shopping center. Johnson also stated that he had the shopping list because Collier dropped it.

The statement by Collier to Stambook is a testimonial statement because it was made during a police interrogation under circumstances that would lead a reasonable person to believe the statement was elicited to establish a past fact for use in a future criminal trial. We do not agree with respondent's argument that the statement by Collier

was not offered for its truth. The statement was offered for its truth, specifically, to prove Johnson and Collier knew each other before they admitted their acquaintanceship.

We conclude, however, that any *Crawford* error was harmless beyond a reasonable doubt. (*People v. Geier* (2007) 41 Cal.4th 555, 608 ["harmless error" analysis applicable to *Crawford* violations].) Evidence of Johnson's guilt as well as evidence of Collier's participation in the offenses was overwhelming apart from Collier's explanation of how and when the two men actually met.

No Abuse of Discretion in Denial of Probation

Johnson contends the trial court abused its discretion by denying probation because the offenses were his first two felony convictions, the probation report recommended probation, and a "time-served" plea bargain was offered by the prosecution before trial. A trial court has broad discretion to grant or deny probation, and we will uphold its decision absent an abuse of discretion. (*People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1530-1531; *People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) We conclude that there was no abuse of discretion in this case.

The record demonstrates that the trial court considered the criteria for granting or denying probation set forth in California Rules of Court, rule 4.414. The record also demonstrates that the probation report listed three aggravating factors (Cal. Rules of Court, rule 4.421), namely the planning, sophistication or professionalism with which the burglaries were committed, a criminal record showing prior convictions of increasing seriousness, and unsatisfactory performance on prior paroles. The trial court made findings of each of these aggravating factors, and noted the current offenses were committed while Johnson was on parole. In light of these findings, imposition of a prison sentence was not irrational or arbitrary. (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831-832.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

John Murphy, Temporary Judge*

Superior Court County of Los Angeles

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant.

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* (Pursuant to Cal. Const., art. VI, § 21.)